DRAGON & PHOENIX BHD.

v.

KESATUAN PEKERJA-PEKERJA PERUSAHAAN MEMBUAT TEKSTIL & PAKAIAN PULAU PINANG & ANOR.

SUPREME COURT, KUALA LUMPUR
LEE HUN HOE CJ (BORNEO)
HARUN HASHIM SCJ
MOHD. JEMURI SERJAN SCJ
[SUPREME COURT CIVIL APPEAL NO. 02-212-89]
7 NOVEMBER 1990

ADMINISTRATIVE LAW: *Jurisdictional error on the facts of the record - Certiorari.*

LABOUR LAW: *Various jurisdictions of Industrial Court - Enforcement or interpretative function - Complaint of non-compliance of award - Interpretation of award - Proceedings should have been commenced under different provision - Sections 33, 56 Industrial Relations Act 1967.*

In Award No. 364/87 (the first award), the second respondent (IC) determined the wages, terms and conditions of employment of the appellant company D. The relevant article in the schedule to the award was Article 26(4) which related to overtime and stated that employees who are required to work for 16 hours or more in any one day due to an emergency shall be granted a paid day-off the following day.

On 29 December 1987 and 30 December 1987, D requested 22 workers to work certain hours to fulfil overseas orders. The workers were not given a paid day off the following day. There ensued a dispute as to whether the workers worked 16 hours and whether the one-hour lunch break should be included in the calculation of the hours worked. The Penang and Seberang Prai Textile and Garment Industry Employees' Union (the union) complained to the IC under s. 56 of the Industrial Relations Act 1967 (the Act). In award no. 116/88 (the second award), the IC agreed with the union and ordered the company to give the 22 employees one paid day off or a day's pay in lieu.

D applied to the High Court for an order of *certiorari* to quash the second award; this was dismissed. Hence this appeal.

Held:

[1] In a complaint of non-compliance with any term of a collective agreement or award under s. 56 of the Act, the function of the IC is a purely enforcement function, not an interpretative one. It is important to recognise the difference between these two functions because of the degree of penalty in the offences under ss. 33 and 56 and also because it is important to determine which particular jurisdiction the Court is exercising in any particular case.

[2] (a) In this case, the matter came before the IC as a complaint of non-compliance with the first award under s. 56 but the resulting second award is in substance an interpretative exercise with a detailed discussion on s. 60A of the Employment Act 1955.

(b) The real issue before the IC was on the interpretation of Articles 14 and 26(4); as such, the union should have applied to the Court under s. 33 for interpretation, therefore there is a jurisdictional error on the face of the record.

[3] (a) On an interpretation of definition of working hours in Article 14, the reference in Article 26(4) to 16 hours means actual hours the employees were at work excluding meal breaks.

(b) In the same award or collective agreement, the words used in the several terms should be given the same meaning unless expressly stated to be otherwise because if this is not done it will lead to confusion.

[Appeal allowed. Certiorari issued to quash Award No. 116/88.]

Legislation referred to:
Employment Act 1955, s. 60A
Industrial Relations Act 1967, ss. 33, 56

For the appellant - C.V. Das (Andrew Saw Tsan Chuan); M/s. Ng Yook Woon, Andrew T.C. Saw & Co.
For the respondents - S. Anthonysamy; Aziz, Anthony & Co.

JUDGMENT

Harun Hashim SCJ:

In Award No. 364 of 1987 (the First Award), the Industrial Court determined the wages, terms and conditions of employment of the Dragon & Phoenix Bhd., Penang (the company). The First Schedule to the award provides (in so far as it is relevant):

> Article 14 - Working Hours
>
> Working hours for all employees shall be as follows:
>
> (a)
>
> (b) Factory & Store
>
> 45 hours per week, excluding lunch breaks; with no tea breaks in the morning and afternoon; and
>
> (c) Factory & Store working hours shall be as follows:
>
> 8.00 a.m. to 12.00 noon; and
> 1.00 p.m. to 4.30 p.m.
>
> Article 26 - Overtime
>
> (4) Employees who are required to work for sixteen (16) hours or more in any one day due to emergency shall be granted a paid day-off the following day.

The company had to fulfil overseas orders and requested nine store workers to work on 29 December 1987 from:

8.00 a.m. to 12.00 noon;
1.00 p.m. to 4.30 p.m.; and
4.30 p.m. to 12 midnight.

On 30 December 1987 the company requested thirteen packing workers to work from:

8.00 a.m. to 12.00 noon;
1.00 p.m. to 4.30 p.m. and
5.00 p.m. to 12.30 a.m. the following day.

The workers from both sections were not given a paid day-off the following day. The company contended that the employees worked only 15 hours on the dates in question and were therefore not entitled to the benefit under Article 26(4). The Penang & Seberang Prai Textile & Garment Industry Employees' Union (the union) representing the company's employees, on the other hand contended that the one-hour lunch break should be included in the calculation of the hours worked and therefore the employees had worked 16 hours to entitle them to the benefit of Article 26(4).

The union complained to the Industrial Court under s. 56 of the Industrial Relations Act that the company had not complied with Article 26(4). The Industrial Court in Award No. 116 of 1988 (the Second Award) agreed with the union and ordered the company to give the 22 employees "one paid day-off or a day's pay in lieu."

The company was not pleased with the Second Award and applied to the High Court for an order of *certiorari* to quash the award. The learned Judge found that there was no jurisdictional error on the part of the Industrial Court. He agreed with the findings and the reasons given by the Industrial Court in respect of the Second Award and dismissed the application. Hence this appeal.

In a complaint of non-compliance with any term of a collective agreement or award under s. 56 of the Industrial Relations Act, the Industrial Court should, as a general rule, look at the terms of the contract by confining itself to within the four walls of the collective agreement or award and decide whether the term has or has not been complied with. It is a purely **enforcement** function. It should not embark on an expedition to examine the provisions of the Employment Act in order to determine the meaning of the term complained of unless there is a specific reference to it because to do so would invoke the **interpretative** function of the Court under s. 33 of the Industrial Relations Act which is an entirely different exercise from the one under s. 56. It is important to recognise the difference between these two functions of the Court because failure to comply with an order under s. 56 is an offence with penal provisions whereas there are no such consequences in respect of a matter dealt with under s. 33. It is also important to separate the two functions in order to determine which particular jurisdiction the Industrial Court is exercising in any particular case. It may well be that in a dispute such as in the present case there should have been two separate applications to the Court, the first under s. 33 to invite the Court to exercise its interpretative function and if there is still non-compliance, a second application for enforcement under s. 56.

In the instant case, the matter came before the Industrial Court as a complaint of non-compliance with the First Award under s. 56 but the resulting Second Award is in substance an interpretative exercise with a detailed discussion on s. 60A of the Employment Act. It is clear therefore that the real issue before the Industrial Court was on the interpretation of Article 26(4) of the award read with Article14. It follows that the union ought not to have made a complaint under s. 56 alleging non-compliance when its interpretation of the terms of the First Award was disputed by the company. It should have applied to the Court under s. 33 for interpretation. We accordingly find that there is a jurisdictional error on the face of the record and the learned Judge ought to have issued *certiorari* to quash the award.

We would, however add, in order to avoid further litigation, that there is really no ambiguity in the terms of the First Award for the following reasons:

> Article 14 provides for 'Working Hours' of employees. It then proceeds to set out the working hours for factory and store employees from 8.00 a.m. to 4.30 p.m. excluding lunch breaks; with no tea breaks in the morning and afternoon;

These words should be given their ordinary meaning. By excluding the one hour lunch break, the total number of hours of work per day is 7½ hours and working 6 days a week this works out to 45 hours per week which is what Article 14(a) prescribes. "Working Hours" under the award means therefore, the actual hours the employees are at work. It follows that under Article 26(4), the reference to "work for sixteen (16) hours or more in any one day" means actual hours the employees were at work excluding meal breaks. In the same award (or collective agreement) the words used in the several terms should be given the same meaning unless expressly stated to be otherwise because if this is not done it will lead to confusion. On this interpretation, we find that the company was right in its contention that the store employees worked only 15 hours on 29 December. In our view, under Article 26(4) the packing workers worked only 14½ hours on 30 December because 'day' in its ordinary meaning commences from midnight to midnight. The additional ½ hour was worked on 31 December.

We pause to observe that we are here not concerned whether working sixteen hours or more a day in an emergency under Article 26(4) contravenes any provisions of the Employment Act. If it does, the remedy is to apply to vary the award under s. 33 to remove the ambiguity. This emphasises the point we averred to earlier, that such questions are not the appropriate subject-matter when dealing with a complaint under s. 56.

For the reasons stated, we would allow the appeal with costs here and below to the appellants. The order of the learned Judge is set aside and we order that *certiorari* be issued to quash Award No. 116 of 1988 of the Industrial Court.

Also found at [1991] 1 CLJ 244